

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 1, 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on	:	Docket Nos. WEST 96-130-D
BEHALF OF ARTHUR R. OLMSTEAD,	:	DENV CD 95-20
Complainant	:	
v.	:	Savage Mine
	:	Mine ID 24-00106
KNIFE RIVER COAL MINING CO.,	:	
Respondent	:	

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Tandra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Complainant;
Laura E. Beverage, Esq., and Rebecca Graves Payne,
Esq., Jackson & Kelly, Denver, Colorado, for
Respondent.

Before: Judge Hodgdon

On June 28, 1996, a decision was issued in this proceeding determining that the Respondent had discriminated against the Complainant by discharging him in violation of section 105(c) of the Federal Mine Safety Act of 1977, 30 U.S.C. § 815(c).

Secretary on behalf of Olmstead v. Knife River Coal Mining Co., 18 FMSHRC 1103 (June 1996). The parties were given 30 days to agree on the specific relief due Mr. Olmstead or to submit their separate relief proposals with supporting arguments.

The parties have made various submissions and participated in several telephone conference calls with the judge. However, they have been unable to agree on all of the remedies to which Mr. Olmstead is entitled. Consequently, this decision and order includes both remedies upon which the parties agree and those on which they do not.

Reinstatement

In accordance with the June 28 decision, Mr. Olmstead was reinstated to his Tipple Operator's position on July 15, 1996. However, the parties have agreed that he would have been awarded a Loader Operator position as of August 28, 1995, had he been working at the time. Consequently, after performing a trial period in that position, he was assigned as a Loader Operator on September 16, 1996, and has received Loader Operator's pay since that time.

Back Pay

The parties have agreed that the Complainant's gross back pay is as follows:

June 26 - 30, 1995	\$ 638.08
July 1 - August 27, 1995	\$ 6,221.28
August 28 - December 7, 1995	\$11,995.36
December 8, 1995 - September 15, 1996	\$ 1,727.32
Overtime (period unspecified)	\$ 369.72
Bonus (period unspecified)	<u>\$ 1,103.36</u>
Total	\$22,055.12

This is based on the Complainant's wages as a Tipple Operator, from June 26 through August 27, 1995, of \$19.94 per hour, and his wages as a Loader Operator, since August 28, 1995, of \$20.54 per hour. Because the Complainant was economically reinstated on December 7, 1995, at his wages as a Tipple Operator, the back pay amount from December 8, 1995, until September 15, 1996, consists only of the \$.60 per hour differential between the two pay rates.

The parties disagree as to how interest should be calculated on the back pay. The Respondent argues that it should be calculated on the "net back pay," which it asserts is the gross back pay less "regular payroll deductions." (Resp. Ltr. Oct. 15, 1996.) The Secretary maintains that the interest should be based on the gross back pay.

I conclude that the Secretary is correct. In *Secretary on behalf of Bailey v. Arkansas-Carbona Company*, 5 FMSHRC 2042, 2052 (December 1983), the Commission held that interest should be calculated on the "net back pay." However, it defined "net back

pay" as the result of subtracting actual interim earnings, earnings by the miner between the time of discharge and the time of reinstatement, from gross back pay, the gross pay the miner would have earned. *Id.* at 2051 n.14. In this case the Complainant's interim earnings as the result of his economic reinstatement from December 8, 1995, until September 15, 1996, have been accounted for in the gross back pay total. Therefore, the Complainant's "net back pay," as defined by the Commission, is the same as his gross back pay.

Accordingly, the Complainant will be awarded interest on his net back pay of \$22,055.12. The interest should be calculated using the *Arkansas-Carbona* method, *Id.* at 2052, as modified by the Commission's decision in *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988), which is as follows: *Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term Federal underpayment rate.*¹

In addition, the parties have agreed that the Complainant will be credited with other non-monetary benefits as part of the back pay award. He will be credited with 87 hours of accrued vacation time and 35 hours of accrued sick leave. He will be credited with service time for pension benefits for the time he was discharged. Finally, six percent of the back pay award will be withheld and contributed to his 401(k) account and he will receive nine percent interest on this contribution.

Other losses and expenses

The parties have agreed that the Complainant will be reimbursed \$120.00 for the purchase of coal he would have received free if he were working for the company; \$8.06 for phone calls to the solicitor; and \$465.26 for mileage, accommodations and meals while attending the hearing. The Respondent does not agree, however, that Mr. Olmstead is entitled to \$1,140.00 in fees paid to his attorney for representation at the company hearing on June 28, 1995, and other work he performed in attempting to get the Complainant reinstated after his discharge. Nor does the Respondent agree that Mr. Olmstead should be reimbursed \$340.00 for the assistance of his union and \$343.20 in costs for his trips to the union office in Beulah, North Dakota.

¹ The applicable interest rates and daily interest factors may be obtained from the Commission's Executive Director, 1730 K St., N.W., Washington, D.C. 20006.

The company cites *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987) in support of its position that the Complainant is not entitled to reimbursement of attorney's fees. That case held that attorney's fees cannot be awarded to private counsel in a discrimination proceeding when the complainant is represented by the Secretary under section 105(c)(2), 30 U.S.C. § 815(c)(2). In this case, however, the Complainant is not seeking an award of attorneys fees for representation by private counsel in the 105(c) proceeding. He is requesting reimbursement for fees expended pursuing other avenues for reinstatement after his discharge.

Although the Secretary has not cited any authority in support of reimbursement, I conclude that the Complainant is entitled to restitution of at least some of the claimed fees. The Commission has not spoken directly on this issue. However, it has made clear from the beginning that the remedial goal of section 105(c) is "to put an employee into the financial position he would have been in but for the discrimination." *Secretary on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982). The Commission stated:

The central purpose of the Mine Act is to promote safety and health among the nation's miners. To accomplish that goal it is essential that miners be encouraged to report unsafe conditions free from the threat of retaliation and subsequent economic loss. Thus, we are persuaded that upon a finding of discrimination, a presumption of the right to monetary relief arises and such relief should be denied only where "compelling reasons" otherwise dictate. Moreover, if monetary relief is denied, the bases for the failure to make the aggrieved party whole must be articulated.

Id.

In this connection, the Commission has held that complainants are entitled to recover expenses incidental to attending the hearing because they "would not have borne such expenses (and inconvenience) but for [the company's] discrimination." *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 144 (February 1982)(citation omitted). *Cf. Hicks v. Cobra Mining, Inc. et al*, 14 FMSHRC 50 (January 1992) (consequential damages included the fair market value of repossessed pickup truck). Similarly, I conclude that Mr. Olmstead would not have incurred the expenses of hiring an attorney but for Knife River's discrimination. For the same

reason, I conclude that he is entitled to reimbursement of money expended attempting to obtain union representation concerning his discharge.

Having concluded that Mr. Olmstead is entitled to reimbursement of these fees, however, does not mean that he is entitled to the amounts he has claimed. In my June 28 decision, I ordered the parties to "submit their respective positions, concerning those issues on which they cannot agree, *with supporting arguments, case citations and references to the record . . .*" 18 FMSHRC at 1117 (emphasis added). With regard to attorney's fees, the Complainant has submitted copies of several bills from his attorney. No references have been made to the record.

The first bill, dated June 29, 1995, in the amount of \$751.00 clearly involves the attorney's representation of Mr. Olmstead at the company hearing. The items dated June 27 and 29, in the amount of \$64.00 on the second bill (July 27, 1995) appear also to be related to the company hearing. The remaining entries on that bill are not specific enough to permit determination as to what they involved. Likewise, with the exception of a September 19, 1995, entry for a telephone conference with Jerry Thompson, who investigated Mr. Olmstead's complaint for MSHA, the entries on the remaining bills are not specific enough to support Mr. Olmstead's claim. The charge for the telephone call with Mr. Thompson was \$10.00. Accordingly, I conclude that Mr. Olmstead should be reimbursed \$825.00 in attorney's fees.

The support for the claim for reimbursement of fees connected with union consists solely of the following:

"The second matter of disagreement is whether Mr. Olmstead should be compensated for the amounts that he spent in order for the union to represent him in his discharge suit. These amounts total \$340.00 for assistance of the union and \$343.20 in costs for his trips to the union office in Beulah, North Dakota (\$.30/mile for 1144 miles).

(Sec. Ltr. Oct. 9, 1996.) This information is insufficient to permit an informed determination as to when these costs were incurred, why they were incurred, what part the union played in this situation, or whether Mr. Olmstead would have incurred the

expenses if he had not been discharge by Knife River.² Consequently, I conclude that the Complainant has failed to provide a basis for reimbursement of these expenses.

ORDER

Having previously found that Knife River Coal Mining Company discriminated against Arthur R. Olmstead by discharging him on June 30, 1995, and on being informed that he was reinstated, as ordered, on July 15, 1996, it is **ORDERED** that:

1. My June 28, 1996, decision in this matter is **FINAL**.
2. The Respondent **PAY** Mr. Olmstead **\$22,055.12** in back pay for the period from July 1, 1995, until his reinstatement on September 15, 1996, with interest computed using the *Arkansas-Carbona/Clinchfield Coal Co.* method. In addition, Mr. Olmstead will be **CREDITED**, as agreed by the parties, with 87 hours accrued vacation time, with 35 hours accrued sick leave, with service time toward his pension benefits for the period of time he was discharged, and with a contribution of six percent of his back pay award to his 401(k) account and nine percent interest on the contribution.
3. The Respondent **REIMBURSE** Mr. Olmstead **\$1,418.32** for reasonable and related economic losses or litigation expenses incurred as a result of his discharge, as detailed in this decision.
4. The Respondent **EXPUNGE** from Mr. Olmstead's personnel file and from company records the discharge and all references of the circumstances involved in it, if it has not already done so.
5. The abatement of the payment of the civil penalty is **LIFTED** and Respondent is **ORDERED TO PAY** a civil penalty in the amount of **\$1,000.00** for its violation of section 105(c).

² Mr. Olmstead testified that the union did not represent him at the company hearing.

The Respondent shall comply with these requirements within 30 days of the date of this final order. Upon timely compliance, this matter will be **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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